TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 212.

JOHN LOWE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 9, 1903.

(18,828.)

(18,828.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 600.

JOHN LOWE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1903.

1 I.—*Petition and Exhibits.—Filed September* 12, 1901.

In the Court of Claims of the United States.

JOHN LOWE, Claimant,
vs.
THE UNITED STATES. } No. 22626.

The claimant, John Lowe, respectfully shows to the court as follows:

I.

That he is a citizen of the United States, a resident of the town of Noroton, Connecticut, and is an officer, of the grade of rear-admiral, on the retired list of the United States Navy, as hereinafter set forth.

II.

That by an act of the Congress of the United States, approved March 3, 1899, (30 Stats. 1004,) entitled, "An act, to reorganize and "increase the efficiency of the personnel of the Navy and Marine "Corps of the United States," it was, *inter alia*, in section 7 thereof, provided,

"That the *active* list of the line of the navy, as constituted by section one of this act, shall be composed of eighteen rear-admirals, seventy captains, one hundred and twelve commanders, one hundred and seventy lieutenant commanders, three hundred lieutenants, and not more than a total of three hundred and fifty lieutenants, (junior grade) and ensigns; Provided, that each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier general in the army."

2 Section 11 thereof, provided—

"That any officer of the navy with a creditable record, who served during the Civil War, shall when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

Section 13 thereof, provided—

"That, * * * commissioned officers of the line of the navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army."

III.

That, thereafter, claimant having reached the age for involuntary retirement from the active list of the navy, he was placed upon the retired list thereof, by direction of the honorable Secretary of the Navy, and advised that from and after December 11, 1900, he should regard himself as transferred to the retired list of officers of the United

States Navy, in accordance with the provisions of section 1444, Revised Statutes of the United States, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.* rear-admiral, in accordance with the provisions of section 11, of the naval personnel act, *supra;* a true and correct copy of the order so placing claimant upon the retired list, as aforesaid, is hereto attached, made part hereof, and marked Exhibit "A."

IV.

That, at the date of the passage of the act aforesaid, and until his retirement, as aforesaid, claimant held the rank of captain in the said navy; that he had a creditable record, and had served during the Civil War; that he received compensation as such captain
3 at the rate of $4,500.00 per annum; and, upon his said retirement, became entitled, by virtue of said provisions of law, to the rank and three-fourths the sea pay of the next higher grade, *i. e.* that of rear-admiral, to wit, the sum of $5,625.00 per annum.

V.

That notwithstanding the rights so secured to claimant by virtue of the provisions of law aforesaid, defendant has refused and still refuses to pay him the compensation so fixed, as aforesaid, namely, three-fourths the sea pay of the grade of rear-admiral; and insists that he is only entitled to receive compensation at the rate of three-fourths the sea pay of the nine lower numbers of that grade; as will appear from copies of the decisions of the acting Auditor for the Navy Department and Comptroller of the Treasury, hereto attached, made part hereof, and marked Exhibits "B" and "C."

VI.

Claimant further shows that the classification of rear-admirals contained in the personnel act aforesaid, namely eighteen, the upper nine numbers to receive the pay and allowances of a major general in the army, and the lower nine numbers to receive the pay and allowances of a brigadier general in the army, was in respect only of the pay of rear-admirals on the active list of the navy; and that no such classification was intended or provided in said act in respect of officers upon the retired list of the grade of rear-admiral.

VII.

4 Claimant further shows that the difference in pay, so withheld from him without right as aforesaid, amounts to the sum of $1,500.00 per annum, and at this time, to the sum of $1,125.00; that, as above shown, he is justly entitled to recover said sum from the defendant, after allowing all just credits and set-offs; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made by him; and that he has at all times borne true allegiance to the United States.

Wherefore, claimant prays that judgment may be entered herein in his favor against the defendant in the sum of $1,125.00.

JOHN LOWE, *Claimant.*

CHARLES L. FRAILEY,
Attorney for Claimant.

STATE OF CONNECTICUT, } ss:
County of Fairfeld, }

Before me, the undersigned, personally appeared John Lowe, who, being by me first duly sworn, on oath, says, that the matters and things set forth in the foregoing petition by him subscribed are true, as he verily believes.

JOHN LOWE.

Subscribed and sworn to before me this 10 day of Sept. A. D. 1901.

JOHN E. KEELER, [SEAL.]
Notary Public.

5 EXHIBIT "A."

John D. Long, Secretary.

W. A. M.
244564.

NAVY DEPARTMENT,
WASHINGTON, *Dec.* 8, 1900.

SIR: On December 11th, 1900, you will regard yourself transferred to the retired list of officers of the U. S. Navy, in accordance with the provisions of section 1444 of the Revised Statutes, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.*, rear-admiral, in accordance with the provisions of section 11, of the naval personnel act, approved March 3rd, 1899.

Respectfully, JOHN D. LONG, *Secretary.*

Captain John Lowe, U. S. N., Pope tube works, Hartford, Conn.

6 EXHIBIT "B."

No. 1489.—A. L. G.

TREASURY DEPARTMENT,
OFFICE OF AUDITOR FOR THE NAVY DEPARTMENT,
WASHINGTON, *January 30th*, 1901.

In reply to this letter the above number must be referred to.

John Lowe, rear-admiral U. S. Navy, retired, Lowecroft, Noroton, Conn.

SIR: Your claim for difference of pay from December 11, 1900, to date, has been disallowed for the following reasons:

You were retired on Dec. 11, 1900, in accordance with the provisions of section 1444 of the Revised Statutes, and with the rank

and three-fourths of the sea pay of the next higher grade, that is rear-admiral, in accordance with section 11 of the naval personnel act of March 3, 1899. You are entitled to and have received, three-fourths of the sea-pay as a rear-admiral, being the pay of a brigadier general of the army, in accordance with section 7 of the naval personnel act.

An officer of the navy with the rank of captain, retired under the provisions of section 11 of the naval personnel act of March 3rd, 1899, which provides, that an officer with a creditable record and who has served in the Civil War, shall when retired, be retired with the rank and three-fourths the sea pay of the next higher grade, is entitled, on retirement after March 3, 1899; to three-fourths the
7 sea pay of a rear-admiral of the nine lower numbers, or three-fourths the pay, then received by a brigadier general of the army. (5 Comptroller's Decisions, 750.)

Respectfully, JOHN M. ELLING,
Acting Auditor.

8 Appeal No. 6328. May—5c.

(EXHIBIT "C.")

Pay of a Captain in the Navy Retired in the Next Higher Grade.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
August 22, 1901.

John Lowe, rear-admiral, U. S. Navy (retired), appealed, June 29, 1901, from the action of the Auditor for the Navy Department in settlement claim No. 1489, dated Jan. 25, 1901, disallowing his claim for difference of pay, as a retired officer.

Said officer at the date of the navy personnel act of March 3, 1899, was a chief engineer with the relative rank of captain. Under the provisions of that act he took rank as a captain in the navy from March 3, 1899. On Dec. 11, 1900, he was placed on the retired list in accordance with section 1444 of the Revised Statutes, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.* rear-admiral, in accordance with the provisions of section 11 of the navy personnel act. Since his retirement he has been receiving the retired pay of a brigadier general of the army, being three-fourths the sea pay provided by law for a rear-admiral of the nine lower numbers.

He made a claim for the difference between the pay so received and the retired pay of a major general of the army, contending that there is only one grade of rear-admiral and that the rate of pay provided for rear-admirals of the nine lower numbers does not apply to officers on the retired list. The auditor disallowed this claim as above stated.

9 In decision of April 29, 1899 (5 Comp. Dec., 750), it was held—

"That by section 7 of said act there was constituted, for pay pur-

poses, two grades of pay for officers in the grade of rear-admiral * * * and that a staff officer with the rank of captain on the active list should be retired under said section upon three-fourths the sea pay of a rear-admiral embraced in the nine lower numbers, or three-fourths the pay of a brigadier general."

On the authority of that decision the action of the auditor disallowing his claim is affirmed.

R. J. TRACEWELL,
Comptroller.

10 II.—*Amendment to Petition. Filed November* 4, 1902.

Comes now the claimant, above named, by his attorney, and with leave of the court in that behalf first had and obtained, amends the petition by him heretofore filed herein, by increasing the amount for which it is there prayed that judgment may be entered for said claimant from $1,125 to $2,750, the latter amount being the difference in pay withheld from claimant without right, as in said petition set forth, from the date of his retirement, December 11, 1900, to October 11, 1902.

JOHN LOWE, *Claimant,*
By CHARLES L. FRAILEY,
His Attorney.

III.—*Amendment to Petition. Filed January* 12, 1903.

VII.

Claimant further shows, that the difference in pay, so withheld from him without right, as aforesaid, amounts to the sum of $1,500, and, at this time, to the sum of $3,125; that, as above shown, he is justly entitled to recover said sum from the defendant, after allowing all just credits and set-offs; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made by him; and that he has at all times borne true allegiance to the United States.

Wherefore, claimant prays judgment herein in his favor against the defendant, in the sum of $3,125.

JOHN LOWE, *Claimant,*
By CHARLES L. FRAILEY,
His Attorney.

A. A. HOEHLING, JR.,
Of Counsel.

11 IV.—*Traverse. Filed January* 12, 1903.

JOHN LOWE
vs.
THE UNITED STATES. } No. 22626. Term 1902–1903.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies

each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.
W.

12 V.—*Findings of Fact and Conclusion of Law. Filed February 2, 1903.*

This case having been heard by the Court of Claims, the court, upon the evidence, make the following findings of fact:

I.

The claimant, John Lowe, then a captain in the United States Navy, with a creditable record, and who had served during the Civil War, was retired by the following order:

"NAVY DEPARTMENT,
"WASHINGTON, *December* 8, 1900.

"SIR: On December 11, 1900, you will regard yourself transferred to the retired list of officers of the United States Navy, in accordance with the provisions of section 1444 of the Revised Statutes, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.*, rear-admiral, in accordance with the provisions of section 11 of the navy personnel act, approved March 3, 1899.

"Respectfully, JOHN D. LONG, *Secretary.*

"Capt. John Lowe, U. S. Navy, Pope Tube Company, Hartford, Conn."

II.

Since his said retirement, claimant has received pay at the rate of $4,125 a year, being three-fourths of $5,500, the pay fixed by section 1261 of the Revised Statutes of the United States as that of a brigadier general in the army.

III.

If paid at the rate fixed by section 1261 for a major general in the army, he would receive pay at the rate of three-fourths of $7,500 a year, being $5,625 a year, a difference of $1,500 a year over and above what he has been and still is receiving, as above stated, amounting to the sum of $3,125.00.

Conclusions of Law.

Upon the foregoing findings of fact, the court decides as a conclusion of law that the petition be dismissed.

13 VI.—*Opinion of the Court.*

WELDON, J., delivered the opinion of the court.

The court has considered, in connection with this case, the case of Gibson, No. 22864. The claimant, a captain in the navy, with a creditable record, and who had served during the Civil War, was retired on the following order:

"NAVY DEPARTMENT,
"WASHINGTON, *December* 8, 1900.

"SIR: On December 11, 1900, you will regard yourself transferred to the retired list of officers of the United States Navy, in accordance with the provisions of section 1444 of the Revised Statutes, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.*, rear-admiral, in accordance with the provisions of section 11 of the navy personnel act, approved March 3, 1899.

"Respectfully, JOHN D. LONG, *Secretary.*

"Capt. John Lowe, U. S. Navy, Pope Tube Company, Hartford, Conn."

Since such retirement the claimant has received pay at the rate of $4,125, being three-fourths of $5,500, the pay fixed by section 1261, of the Revised Statutes as the pay of a brigadier general in the army. If paid at the rate of a major general in the army, he would have received pay at the rate of three-fourths of $7,500 a year, being $5,625 a year, a difference of $1,500, a year above what he has been receiving as above stated.

This suit was brought to recover the difference between the pay of a brigadier general in the army and that of a major general.

Section 1444, Revised Statutes, is as follows: "When an officer below the rank of a vice-admiral is 62 years old he shall, except in the case provided in the next section, be retired from the active service."

Section 11 of the navy personnel act is as follows: "That any officer of the navy with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths sea pay of the next higher grade." (30 Stat. L., 1007.)

Section 13 of the naval personnel act (30 Stat. L., p. 1007) provides as follows:

"That after June 30, 1899, commissioned officers of the line of the navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army."

The first proviso in section 7 of the naval personnel act (30 Stat. L., p. 1005) is as follows:

"That each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowances as are now allowed a brigadier general in the army."

It is insisted by claimant that being a rear-admiral on the retired

list he ranks with a major general in the army, and therefore entitled to the same pay.

14 The question is therefore presented as to whether a captain in the navy when retired as a rear-admiral, under the provisions of section 1444, Revised Statutes, and section 11 of the naval personnel act, shall receive the pay of a major general or that of a brigadier general.

It is contended by the defendants, that when the claimant was promoted to the next higher grade, to wit, rear-admiral, that he became in legal effect a part of the nine lower number- of the eighteen rear-admirals provided for by the provisions of section 7, as quoted above.

The contention is, therefore, to be determined by the decision of the question as to which class he legally belongs. If by operation of his retirement he passes into and becomes a part of the higher number, his contention as to the pay of a major general is well founded; but if in legal effect he became a part of the lower number, he is entitled to the pay of a brigadier general, and is therefore not entitled to recover in this proceeding, having been paid at that rate.

It is said by the Comptroller of the Treasury (vol. 7, p. 164), "The naval personnel act abolished the grade of commodore and practically substituted a new grade for pay purposes within the grade of rear-admiral, known as the nine lower numbers of that grade, and into this subgrade commodores were advanced."

This presents the real issue in this proceeding, and if that construction be correct, then the claimant has been paid all he is entitled to, and is therefore not entitled to recover.

It is insisted by counsel for claimant in the Gibson case—a like case, that the fact that sections 8, and 9, of the personnel act retained for purposes of pay certain officers of the rank of commodore, which corresponds to that of brigadier, without any express provision of retirement in the next higher grade above that of captain, is an indication of a legislative intent to place the claimant, retired under section 11, of said act, in the rank or grade of a rear-admiral having pay of the higher number; that without qualification the retirement of the claimant was to the full pay of a rear-admiral without diminution incident to the numbers in the list of admirals.

In support of the theory of the plaintiff's right to recover, our attention has been cited, in the case of Gibson, argued in connection with this case, to the decision of the Supreme Court in the case of *Rodgers v. The United States* (185 U. S., p. 83), affirming the decision of this court in 33 C. Cls. R., p. 266, in which the Supreme Court says:

"Prior to the act of March 3, 1899, the corresponding ranks of officers of the navy and the army were rear-admiral and major general, commodore and brigadier general, captain and colonel. By that act the rank of commodore was abolished, although that of brigadier general was undisturbed. No change was made in the relative rank of captain and colonel, or of rear-admiral and major

general, but the legislation left one rank in the army to which there was no corresponding rank in the navy. The statute in effect lifted the rank in the navy which was corresponding to that of brigadier general in the army to that of rear-admiral, and corresponding with that of major general in the army."

It is contended that this definition of the relative rank between the officers of the army and navy tends to strengthen the claims of the plaintiff.

The decision settles the rank of the claimant, but that does not settle the question in issue in the case.

It is said in that connection, that there is no exception in the terms of the law which justifies the claimant being placed on the lower basis of pay, but in reply to that it may be said that there is no provision of the law placing him on the higher basis, the pay of an admiral.

The statute has made a distinction in pay of the admirals on the active list by a classification by numbers, and upon that classification has based the emoluments of the rank, and when the claimant is placed in the rank, he confronts two conditions, which may from the pay be called the higher and lower number.

It is ably argued by the counsel in the case of Gibson, No. 22864, and in this case, that there is no room for construction of the act upon which the claimants' right is based; that the words of the law are plain and unambiguous, and therefore it is the duty of the court to enforce the statute by the application of its terms and language. Many authorities are cited to sustain the theory, that where the words are plain and unambiguous there is no room for construction or interpretation; and therefore the simple duty of the court is to apply the law as by its terms it has been enacted by the legislature. It is said in substance that section 11 does not provide that a captain who has served during the Civil War upon retiring with the rank of a rear-admiral shall receive less than the rank of a rear-admiral, and that the classification of higher or lower numbers is intended for the active list of the navy, and has no application to the claimant, he being on the retired list; that if it had been the intention of Congress that the claimant was to receive the pay of a brigadier general, it would have been so provided in the statute, and that in the absence of any such provision the statute must be interpreted, not from conditions existing in the retired list, but from the words of the law. In support of the theory that where the real meaning of the statute is plain and there is no room for ambiguity, it is the duty of the court to enforce it according to its very language.

Our attention has been cited to the cases of *Lake County v. The United States* (130 U. S., 662, 663); *United States v. Tyler* (105 U. S., 244); *Thornley v. The United States* (173 U. S., 310); *Queen v. Poor Law Commission* (6 Adolph and Ellis, 66); *County Seat of Linn County* (15 Kansas, 501), and other cases, establishing the well-settled doctrine that statutes are to be applied and not construed when no doubt arises from the words and provisions of the law. We have carefully examined the cases relied on by counsel in both cases; but do not find that they settle the controversy arising upon

the words and terms of the various statutes in relation to the subject-matter of this proceeding, as contended by claimants.

In the construction of the thirteenth section of the personnel act, and the section of said act which makes a distinction in the pay of rear-admirals dependent upon their grade in numbers, we are dealing with a condition arising from the proviso making such distinctions, and must deal with that condition in the most reasonable way in determining the will of the legislature. The two sections taken together require construction and interpretation, and we are not confined to the application of the mere words of the statute. Where the words are plain and unambiguous the duty of the court is to apply the plain words of the statute; but when the subject-matter of the law is somewhat variable, then it is the duty of the court to so interpret or apply the words of the law as is most reasonable and
16 just to such conditions, and thereby effectuate the intent of the legislature. Upon the transfer of the claimant to the retired list of the navy, by operation of law he succeeded to the next highest rank as a rear-admiral it is true, but in that rank we find a classification as to pay; that classification has a higher and lower grade of pay, one-half receiving the sum of $7,500 and the other half the sum of $5,500. The question in this case is not a question of rank but of pay, and the next highest pay to a captain (the rank of commodore being abolished by the personnel act) is that of an admiral in the lower number of the list of admirals.

As has been said, this is a question of pay and not of rank in the active list of the navy, and we find a classification of admirals as to pay, the higher numbers receiving the larger pay and the lower numbers the smaller pay. The intent of the personnel act as shown by the words of the statute was to promote the claimant to the corresponding rank in the army, but the rank in the navy corresponding to the rank in the army has two grades of pay, depending on the number which is held by the respective officers, thereby establishing a variety in the condition of pay. Promotion unless otherwise ordered is by regular gradation, and each step is presumed to be taken unless otherwise provided. Applying that rule to the case of the claimant, his first step being promotion of pay would be into that grade having a lower rate of pay, and not into the grade having the right of higher pay.

The main object of the act of March 3, 1899, in dealing with the rights of the claimant was promotion for the purpose of pay, and not of rank; and the qualifications on that promotion "with rank and three-fourths sea pay of the next higher grade, *i. e.*, rear-admiral," as stated in the order, following the substance of the statute, must mean the pay of a brigadier general, that pay corresponding with the pay of the nine lower numbers on the active list.

Pay and not rank being the paramount purpose of the law, we must regard the grades of pay which we find incident to the active list of the navy, and at the threshold of those grades looking at and for the "next higher" we find as the lowest grade of pay the pay of a brigadier general, and keeping in view the idea of it being a

question of pay, we must adopt as the "next higher" the lower grade of pay.

In support of this theory of the law the case of Rodgers, *supra*, may be cited, in which it is said in the opinion of the Court of Claims (36 C. Cls., R., 275): "That for the purpose of pay a distinction is created by the act (R. S., sec. 1366) in the grade of rear-admiral and special provision therefor."

In affirmation of the decision of this court the Supreme Court says: "The individuals thus raised in rank were not so raised on account of distinguished services or for any personal reason, but simply in consequence of the abolition of the official rank they had held. Is it unreasonable to believe that Congress thought it unwise to give to those officers (who had neither by length of service or by personal distinction become entitled to the position of rear-admiral, as it had stood in the past) all the benefits of such position? Would it be unnatural for Congress to bear in mind those who, by length of service or by personal distinction, had already earned the position, and provide that in, at least, the matter of pay there should be some recognition of the fact? Again, is it unreasonable to believe that Congress intended that those officers whose past services placed them according to the prior relative rank side by side with brigadier generals of the army should not, by a mere change of statute, be given a benefit in salary which was not at the same time accorded to brigadier generals in the army? May not this explain its action in so dividing the rear-admirals into two classes—one composed substantially of former rear-admirals, equal both in rank and pay with major generals in the army, and the other of those who in the past were only commodores, to whom was given the rank of rear-admirals but the pay of brigadier generals in the army?"

It is the conclusion of the court that the claimant, for the purpose of pay, falls within the lower numbers of the rear-admirals having the pay of a brigadier general in the army and having been paid at that rate, the petition is therefore dismissed.

17 VII.—*Judgment of the Court.*

JOHN LOWE
vs.
UNITED STATES. } No. 22626.

At a court held in the city of Washington on the second day of February 1903 judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimant John Lowe be dismissed.

BY THE COURT.

18 VIII.—*Application for and Allowance of Appeal.*

JOHN LOWE
v.
UNITED STATES. } No. 22626.

Comes now John Lowe, the above-named claimant, by his attorney of record, and prays an appeal to the Supreme Court of the United States, from the final judgment of this court dismissing his petition, as amended herein.

JOHN LOWE, *Claimant,*
By CHARLES L. FRAILEY,
His Attorney.

Filed February 2, 1903.

Ordered. That the appeal as prayed for be allowed.

BY THE COURT.

February 2, 1903.

19 Court of Claims.

JOHN LOWE
vs.
UNITED STATES. } No. 22626.

I John Randolph assistant clerk Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 5th day of February A. D. 1903.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18,828. Court of Claims. Term No. 600. John Lowe, appellant, *vs.* The United States. Filed February 9th, 1903.

FILE COPY.

FILED
MAR 14 1904
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 212.

JOHN LOWE, APPELLANT,

v.

THE UNITED STATES.

MOTION TO ADVANCE THIS CAUSE FOR ARGUMENT IMMEDIATELY AFTER No. 195.

Comes now the above-named appellant and moves the court to advance this cause for hearing immediately following the case of William C. Gibson *v.* The United States, No. 195, October term, 1903, and for grounds of motion shows to the court:

1. That the present case and said Gibson case each involves the question whether a captain in the United States Navy, when retired as a rear admiral under the provisions of section 1444, Revised Statutes of the United States, and section 11 of the Navy Personnel act, approved March 3, 1899 (*30 Stats., 1007*), shall receive the pay of a major general or that of a brigadier general.

2. That the opinion of the Court of Claims was rendered in this case, the same judgment having been entered in said Gibson case without further opinion (*38 Court of Claims, 170*).

That to so advance this case will in large part obviate the necessity of rearguing at length the questions of law so involved in both cases, will facilitate the consideration and disposition of said cases, and will economize the time of both court and counsel.

We are authorized to say that the United States consents to this motion.

CHAS. L. FRAILEY,
A. A. HOEHLING, JR.,
Attorneys for Appellant.

19723

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 212.

JOHN LOWE, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

A. A. HOEHLING, JR.,
CHARLES L. FRAILEY,
Attorneys for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 212.

JOHN LOWE, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE.

The appellant, immediately prior to the 11th day of December, 1900, was an officer of the Navy, formerly of the engineer corps, but transferred to the line with the rank of Captain under and by virtue of the "Navy Personnel act," so called, hereinafter mentioned. On that date he was retired under and by virtue of section 1444 of the Revised Statutes of the United States and section 11 of an act of Congress commonly called the "Navy Personnel act," approved March 3, 1899. He had been an officer of the Navy with a creditable record and had served during the Civil War, and therefore was an officer contemplated by section 11 of the "Personnel act."

The single question involved in this case is as to the pay to which appellant is entitled as an officer of the Navy re-

tired pursuant to section 11. This question arises in the following manner:

Congress, by section 7 of the "Personnel act," established and constituted the *active* list of the line of the Navy. So much of that section as is applicable to this controversy is as follows:

"That the active list of the line of the Navy as constituted by section 1 of this act shall be composed of: Eighteen Rear Admirals; seventy Captains; one hundred and twelve Commanders; one hundred and seventy Lieutenant Commanders; three hundred Lieutenants, and not more than a total of three hundred and fifty Lieutenants (junior grade) and Ensigns; *provided*, that each Rear Admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowances as are now allowed a Brigadier General in the Army."

Section 13 of the act provides that after June 30, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of the law for officers of corresponding rank in the Army. By section 1446 of the Revised Statutes of the United States, Rear Admirals of the Navy rank with Major Generals of the Army.

Section 11 of the "Personnel act" provides that any officer of the Navy with a creditable record who served during the Civil War shall, when retired, be retired with the rank and three-fourths sea pay of the next higher *grade*.

The appellant, being one of the officers embraced by section 11 of the act, by his retirement, having the rank of Captain on the active list, became therefore entitled to three-fourths sea pay of the next higher grade, or that of Rear Admiral. Instead, however, of receiving three-fourths of the sea pay of a Rear Admiral, or its equivalent, three-fourths of the pay of a Major General of the Army, the appellant has been and is receiving but three-fourths of the

pay of a Brigadier General of the Army, or three-fourths of the sea pay of a Rear Admiral of the nine lower numbers of the *grade*. The appellant thereupon made application to the Auditor for the Navy Department in the latter part of January, 1901, for the difference in pay between that which he was receiving and three-fourths of the pay of a Major General of the Army, this difference being $1,500 a year. This claim was refused by the Auditor (Rec., p. 3) on the authority of a decision of the Comptroller of the Treasury. On the 29th of June, 1901, the claimant appealed from the action of the Auditor for the Navy Department to the Comptroller, who sustained the Auditor, rendering a short opinion (Rec., p. 5). The Comptroller held that there were "two grades of pay for officers in the grade of Rear Admiral," and that therefore three-fourths of the next higher grade meant the next higher pay grade, or that of a Brigadier General in the Army (Rec., p. 5).

Thereupon the appellant brought suit in the Court of Claims for the difference between the pay he was receiving and that which he claimed he was entitled to receive, as above set forth. The Court of Claims found the facts substantially as has been stated, but sustained the views of the Comptroller of the Treasury that Admiral Lowe was not entitled to three-fourths of the pay of a Major General, because there were two *pay* grades in the grade of Rear Admiral; those grades of pay being created by the *proviso* in section 7 of the "Personnel act" above quoted.

The Court of Claims after delivering its opinion dismissed the petition (Rec., p. 11), and the claimant then appealed to this Court.

ASSIGNMENT OF ERRORS.

The Court of Claims erred—

1. In holding that the *proviso* in Section 7 of the Navy Personnel act providing "that each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowances as are now allowed a brigadier general in the Army," taken in connection with section eleven of that act, which provides "That any officer of the Navy with a creditable record, who served during the Civil War, shall when retired, be retired with the rank and three-fourths the sea pay of the next higher grade," applied to the appellant upon his retirement.

2. In holding that the above proviso, in section 7 of the Navy Personnel act, created a pay grade which constituted the "next higher grade" for pay purposes within the meaning of section eleven of the act above quoted.

3. In holding that three-fourths the sea pay of the "next higher grade" meant, when applied to the appellant, three-fourths the pay of a Brigadier General of the Army as provided for each of the nine lower numbers on the active list of the Navy in the above-mentioned *proviso* to section seven, above quoted.

4. In entering its judgment that the appellant's petition be dismissed and in dismissing the same.

ARGUMENT.

I.

THERE IS NO LANGUAGE IN THE SECTIONS OF THE NAVY "PERSONNEL ACT" APPLICABLE TO THIS CASE WHICH PROVIDES THAT OFFICERS OF THE NAVY WITH THE RANK OF CAPTAIN, WHO RETIRE WITH THE RANK AND THREE-FOURTHS SEA PAY OF THE NEXT HIGHER GRADE, ARE TO BE INCLUDED AMONG THE NINE LOWER NUMBERS OF THE ACTIVE LIST OF THE REAR ADMIRALS, OR THAT THERE IS A PAY GRADE FORMED BY THE NINE LOWER NUMBERS OF REAR ADMIRALS ON THE ACTIVE LIST WITHIN WHICH THE RETIRING OFFICERS ABOVE MENTIONED ARE TO BE INCLUDED.

As above shown, commissioned officers of the Navy, by section 13 of the "Personnel act," are to receive the same pay and allowances, except forage, as are or may be received by officers of corresponding rank in the Army. The pay of the *grade* of Rear Admiral equals the pay of a Major General in the Army. A careful reading of section 7 of the act discloses that the pay of the *grade* of Rear Admiral has not in any way been affected or taken from the operation of section 13. There is, however, a proviso in section 7 which is absolutely and clearly limited in its operation and effect. It provides that the *nine lower numbers* of the *grade*, to wit, the *grade* of Rear Admiral, shall receive the pay and allowance of a Brigadier General of the Army. This proviso refers only to a certain class of persons—that is to say, only the nine individuals having the nine lower numbers of the *grade* of Rear Admiral. If the proviso had named the persons who were to receive this stated pay, how could it be claimed that any other than those named should receive the compensation provided for? Not designating the indi-

vidual, however, by name, it does designate all those who may at any time occupy the places in the *grade* described by the words "nine lower numbers." How, then, can any person not being a Rear Admiral of the nine lower numbers of that grade come under the operation of the proviso and be required to accept the compensation therein mentioned?

The pay of the appellant as a retired officer is fixed by statute only. It is fixed by section 11 of the Personnel act. If we turn to section 11, we find there not a word or line which indicates that any officer of the rank of Captain and who has served during the Civil War shall, upon retiring with the rank of Rear Admiral, receive the pay of a Brigadier General. If it had been the intention of Congress that such should be the case, it may be safely presumed that that body would have added a proviso to section 11, providing that an officer retiring with the rank of Rear Admiral should receive three-fourths the pay of a Brigadier General. On the contrary, however, the rank and three-fourths of the sea pay of the next higher *grade*, but nothing more or less, is found in section 11. That being the case, and the pay of a Rear Admiral *as a grade* being provided for by section 13 as that of the corresponding rank in the Army, to wit, that of a Major General, it necessarily follows that the appellant, and all other officers with a creditable record who rank as Captain and retire from the active list, having served during the Civil War, must be entitled to three-fourths of the sea pay of the next higher grade, to wit, three-fourths of the pay of a Major General.

Again, it will be seen at a glance that section 7 constitutes the *number* of Rear Admirals who shall be upon the active list of the Navy, and that the proviso referring to the pay of the nine lower numbers of the grade must refer to the *active* list and to the active list only, because it applies to certain of the eighteen who are limited to the active list. There are no numbers on the retired list of the Navy, and if the contention of the defendant is to prevail, instead of there being

nine to receive the pay of a Brigadier General, as contemplated by the proviso, there would be many more than nine receiving the pay or three-fourths thereof. This state of affairs is beyond the meaning of any expression contained in the language of the proviso.

If Congress had contemplated the division into *two pay grades* for both the active and retired lists, it could have said so in express terms in the same manner as it had before spoken with reference to Lieutenants, for in section 7, in stating of what the active list of the Navy shall consist, it mentions a certain number of Lieutenants and a certain number of Lieutenants, "junior grade."

II.

WHERE THE MEANING OF A STATUTE IS PLAIN AND THERE IS NO AMBIGUITY IT IS THE DUTY OF THE COURTS TO ENFORCE IT ACCORDING TO ITS OBVIOUS TERMS AND NOT TO INSERT WORDS AND PHRASES SO AS TO INCORPORATE THEREIN A NEW AND DISTINCT PROVISION. THIS WELL-KNOWN PRINCIPLE OF CONSTRUCTION IS APPLICABLE TO THE SECTIONS OF THE PERSONNEL ACT UNDER CONSIDERATION.

A review of some of the principal cases decided by this court in support of the foregoing contention is now given, illustrating the applicability of the rule to the case at bar.

The constitution of the State of Colorado provided that—

"No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: * * * " Here follows the rate of taxation. It then goes on, "and the aggregate *amount of indebtedness* of any county, for *all* purposes, exclusive of

debts contracted before the adoption of the constitution, shall not at any time exceed twice the amount above herein limited. * * * "

A suit was instituted against Lake county, in that State, upon a large number of county warrants issued for the ordinary county expenses, such as witnesses, and jurors' fees, etc. One of the defenses offered to the suit by the county was want of authority on the part of the county commissioners to issue the warrants in question. It was claimed that the provision of the State constitution above partially quoted from sustained the defense. The plaintiff below replied that this provision of the State constitution was not applicable to the warrants issued, being applicable only to debts created by loan for the purpose of erecting public buildings, etc., and that the above provision did not include or affect the loans for ordinary expenses of the county. In support of this interpretation the counsel for the defendant in error urged that the word "such" should be interpolated before the word "indebtedness" in the constitutional provision on the ground that it would then leave unlimited those necessary debts made without a loan and which are essential to county government and life.

Says the court (on page 673):

"In the light of these principles, expressed in the authorities quoted and in many others, we must decline to read the expression in section six, 'and the aggregate amount of indebtedness of any county, for all purposes,' etc., as if it were written 'and the aggregate amount of such indebtedness,' etc. This the defendant in error concedes to be necessary to his case. We see no admissible reason for the introduction of this restrictive word 'such' except to alter radically the plain meaning of the clause."

Lake County *vs.* Rollins (*130 U. S., 662, 673*).

In the following case the question arose as to whether an officer of the Army on the retired list was entitled to the increase of pay of 10 per cent. for each five years of service

which was allowed to officers on the active list. The statutes governing the case are sections 1262, 1263, 1274, and 1275 of the Revised Statutes, as follows:

"SEC. 1262. There shall be allowed and paid to each commissioned officer below the rank of Brigadier General, including Chaplains, and others having a similar rank or pay, ten per centum of their current yearly pay for each term of five years of service."

"SEC. 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law."

"SEC. 1274. Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired."

"SEC. 1275. Officers wholly retired from the service shall be entitled to receive, upon their retirement, one year's pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement."

The court quoted from other sections of the Revised Statutes which named those who were *in the service* as Army officers, which included retired officers. After holding that an Army officer who was retired from active duty was still *in the service*, the court, construing section 1262 (above quoted), held that a retired officer was entitled to a 10 per centum increase of his current yearly pay for each five years of service, thus reading that section as it was written, and not introducing the word "active" before the word "service."

United States *vs.* Tyler (*105 U. S., 244*).

Another case directly in point is the following:

An officer of the Navy named Thornley brought suit against the United States to recover the balance of pay claimed to be due him by reason of the fact that he was entitled to longevity pay while on the retired list of the Navy. His claim was based upon sections 1556 and 1588 of the Revised Statutes, prescribing the pay of certain officers of the Navy.

Section 1556 provided that:

"The commissioned officers and warrant officers *on the active list* of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the Navy shall be entitled to receive annual pay at the rates herein stated after their respective designations: The Admiral, thirteen thousand dollars; * * *; Surgeons, Paymasters and Chief Engineers, who have the same rank with Paymasters during the first five years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave, or waiting orders, two thousand dollars; during the second five years after such date, when at sea, three thousand two hundred dollars; on shore duty, two thousand eight hundred dollars; on leave, or waiting orders, two thousand four hundred dollars; during the third five years after such date, when at sea, three thousand five hundred dollars; on shore duty, three thousand two hundred dollars; on leave, or waiting orders, two thousand six hundred dollars; during the fourth five years after such date, when at sea, three thousand seven hundred dollars; on shore duty, three thousand six hundred dollars; on leave, or waiting orders, two thousand eight hundred dollars; after twenty years from such date, when at sea, four thousand two hundred dollars; on shore duty, four thousand dollars; on leave, or waiting orders, three thousand dollars."

Section 1588 provided that:

"The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty-five years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half of the sea pay provided by this

chapter for the grade or rank held by them respectively, at the time of their retirement."

The appellant Thornley contended that upon the proper construction of these two sections he was entitled to longevity pay, although a retired officer. The United States, on the other hand, contended that longevity pay is only given to officers on the active list of the Navy.

Says the court (on page 313):

"Where the meaning of a statute is plain it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction. * * * Applying this rule, we are of the opinion that the case of the appellant finds no support in any act of Congress."

On page 314 the court further stated:

"The appellant seeks to find a reversal of this persistent policy of Congress, in respect to the pay of naval officers, in the expression found in section 1588 of the Revised Statutes, to wit: 'That the pay of all officers of the Navy, who have been retired * * * shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held respectively at the time of their retirement.'

"The contention is that by these words Congress intended to give, in this roundabout and indirect manner, longevity pay to the retired officers, which, when dealing directly with the subject, it had uniformly refused to give them. To our minds the section will bear no such construction. Its plain meaning is that the pay of a retired officer shall be three-fourths of the sea pay to which he was entitled when he was retired. It is contended that, because Congress graduated the pay of the officers on the active list by the length of their time of service, officers not on the active list are entitled to the same increase. But the contrary is the true construction. By omitting retired officers from the class entitled to longevity pay, Congress expressed its purpose not to allow them longevity pay. No other construction can be put upon the law without importing into it words which Congress has left out, namely, that besides the pay to which his grade or

rank at the date of his retirement entitled him, the retired officer should receive for every period of five years after his retirement, the increased pay allowed officers on the active list. To give the statute this meaning would be legislation and not interpretation."

Counsel for defendant there cited the case of the United States *vs.* Tyler (*supra*) as a precedent in his favor; but the court distinguished that case on the ground that section 1262 of the Revised Statutes did not restrict the increased pay to officers in *active* service, but that in the case before them the statute on which the appellant relied excluded him by its terms from its benefits.

In conclusion, the court said:

"We are not called upon to explain why Congress should apply one rule to officers of the Army and another to the officers of the Navy. It is sufficient to say that it has clearly done so. If the law is unequal and unjust, the remedy is with Congress and not with the courts."

Thornley *vs.* United States (*113 U. S. 310*).

It will be seen that in that case an officer of the Navy attempted to read into the statute that which would make it applicable to officers on the retired list; but the court held that the meaning of the statute was too plain to leave room for construction and excluded such an interpretation.

In the case at bar the defendant seeks to read into section 7 of the "Personnel act" that which would make the proviso relating to the pay of the nine lower numbers of the grade of Rear Admiral on the *active* list apply also to officers on the *retired* list who retired under the provisions of section 11, although not one word in the proviso or in section 7 or in any other section of the "Personnel act," as has been seen, extends the operation of the proviso to such retired officers.

The decision in the case of Thornley *vs.* United States (*supra*) should be conclusive of the question now at issue.

An officer of the Navy, Graham, was refused mileage at the rate prescribed by law for traveling outside of the United States, pursuant to a practice refusing such claims which had existed in the Navy Department for many years. By an act of Congress of 1835 it was provided:

"It is expressly declared that the yearly allowance provided for in this act is all the pay, compensation and allowance that shall be received under any circumstances whatever, by any such officer or person, except for traveling expense under orders, for which ten cents per mile shall be allowed."

Notwithstanding this act, there was a Navy regulation of 1865 providing that, for traveling outside of the United States, the actual expenses only of an officer should be allowed.

Considering the act of Congress just quoted, the court held (page 221):

"'The operative words in the act of 1876 are 'the sum of eight cents per mile shall be allowed.' In Temple's case it was said that the language of the act of 1876 was so clear and explicit as not to be open to construction, and to our minds the same is true of the act of 1835. Under both acts all traveling expenses are to be paid by mileage, and there is not in either of them any indication of an intention of Congress to make a distinction between travel by sea or on land, in foreign countries or in the United States. As was remarked by Mr. Justice Woods, 'The practice * * * finds no higher warrant or sanction in the act of 1835 than in the act of 1876.'

"Such being the case, it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation. If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with the language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The

cases to this effect are numerous. Edwards' Lessee *vs.* Darby, 12 Wheat., 206; United States *vs.* Temple, *supra;* Swift Company *vs.* United States, 105 U. S., 691; Ruggles *vs.* Illinois, 108 U. S., 526."

United States *vs.* Graham (*119 U. S., 219*).

Here, again, the United States, as in the case at bar, attempted to ascribe to the act of Congress providing for mileage a meaning which it does not contain. Not even a long-continued practice of the Department nor a regulation of the Navy Department can inject that into a statute which is not to be found in it and is clearly absent from it.

See, also, the case of United States *vs.* Temple (*105 U. S., 97*), in which the court announced the same conclusion with reference to a similar act, saying:

"The statute and the finding of the Court of Claims leave little room for controversy. The law as it stood when the travel was performed was explicit, and is not open to construction. We find in it no warrant for the distinction made by the accounting officers of the Treasury between travel by sea and travel on land within the United States, performed by an officer of the Navy while engaged on public business. To hold that for one class of travel he should have eight cents per mile, and for the other his actual expenses, is to make the law and not to construe it."

In Farnsworth *vs.* Montana (*129 U. S., 104*) it was sought to have this court take jurisdiction of a criminal case on writ of error to the supreme court of the then Territory of Montana. The act of March 3, 1885 (*23 Stat., 443*), reads as follows:

"No appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars."

It was, of course, clear, that no jurisdiction attached by virtue of this clause; but section 2 provided:

"That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

It was claimed that this second section gave this court jurisdiction in criminal cases, because it was to be exercised where the validity of a statute of the United States was drawn in question, regardless of the sum or value in dispute; and there being the validity of a statute of the United States in dispute, jurisdiction must therefore attach.

But this court, construing this act, held that the words "in all such cases, an appeal or writ of error may be brought without regard to the sum or value in dispute" meant that the cases excepted by the second section from the operation of the first, must have *some* pecuniary matter in dispute, as was clearly implied by the language used. Said the court, in conclusion (page 113):

"It would have been easy for Congress to confer upon this court jurisdiction in criminal cases from the Territories, by plain and explicit language; and for the reason that no such jurisdiction exists by statute in the present case."

So we say that Congress could have very easily indicated its desire to give to the class of retiring Navy officers to which the appellant belongs, the pay of a Brigadier General, "by plain and explicit language." But instead of this, Congress used the unambiguous expression "three-fourths sea pay of the next higher *grade*," which is that of Rear Admiral, and the pay of which is fixed as that of a Major General.

As in the case last cited, the language "without regard to the sum or value in dispute" implied that there must nevertheless be at least a "sum or value," no matter how

small, in dispute, so in the case at bar, we submit, that the language of the *proviso* in section 7, "that each rear-admiral embraced in the nine lower numbers of *that grade* shall receive," &c., &c., implies that the *grade* itself and its rank and pay are unchanged, and is to be considered in its full effect in both capacities when referred to in another section of the same statute. That Congress so understood this is to be drawn from the language used in sections 8 and 9 of the act, as to which we make comment hereafter.

The most recent declaration of this court in which an attempt to change the clear wording of a statute so as to extort another meaning therefrom than that which the literal reading of the same expressed is to be found in the following case, decided in December, 1899.

In this case one of the questions involved depended upon the construction of the act of April 10, 1869, commonly called the "Married Women's act" as the same was reenacted in sections 727 to 730, both inclusive, in the Revised Statutes of the United States, relating to the District of Columbia. The two sections in the original act of 1869 read as follows:

"That in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *femme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married women may convey, devise and bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried."

"SEC. 2. *And be it further enacted*, That any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

As re-enacted in the Revised Statutes they read thus:

"SEC. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts."

"SEC. 728. Any married woman may convey, devise and bequeath *her property*, or any interest therein, in the same manner and with like effect as if she were unmarried."

"SEC. 729. Neither the husband nor his property shall be bound in any such contract, made by a married woman nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

It was contended, on the part of counsel for the defendant in error, that the words "*her property*," in section 728 of the Revised Statutes, really meant all the property of a married woman *acquired in any other way than by gift from her husband*, because in the original act of 1869 the conveyances and devises of a married woman were limited to such property by the words "the same," referring to her property acquired otherwise than from her husband. Plaintiff in error, on the other hand, contended that the words "her property" were to be taken literally and included, therefore, all the property a woman might have, whether she acquired it by gift from her husband or otherwise.

Says the court on page 419:

"The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone

it is fairly susceptible of but one construction, that construction must be given it. (Heydon's case, 3 Fed. Rep. 76; United States *vs.* Freeman, 3 How. 556; Smythe *vs.* Fiske, 23 Wall. 374; Platt *vs.* Union Pacific Railroad Company, 99 U. S. 48; Thornley *vs.* United States, 113 U. S. 310; Viterbo *vs.* Frielander, 120 U. S. 707, 724; Lake County *vs.* Rollins, 130 U. S. 662; United States *vs.* Goldenberg, 168 U. S. 95.)"

The court also cited many cases and quoted from them which hold that where the meaning of a section of the Revised Statutes is clear, resort cannot be had to the statute which was revised in order to see whether or not Congress meant something different from what it said or erred in the revision of the statute. The court, therefore, held that the words in the revision "her property" meant what they said and included all a married woman's property, and that, therefore, a will devising property which had been given to a woman by her husband, the validity of which was a point in the case, was valid.

Hamilton *vs.* Rathbone (*175 U. S., 414*).

This last case is particularly applicable to the case at bar. It was urged by counsel for the defendant in error in that case that because the original "married women's act" of 1869 defined a married woman's separate estate so called, and later limited a married woman's power of disposition by will to her separate estate by the use of the words "the same," as in the act above set forth, there was strong ground for holding that where, in the revision of the "married women's act," after *defining* the married woman's separate estate in the same manner as the original act defined it, the *revised statute* used the words "*her property*" in giving a married woman the power of disposition by will, it must have meant her *said* property, to wit, her separate estate only—that is, that the words "her property" were equivalent to "the same."

Surely that was a much stronger ground for urging the court to construe that statute than is presented by the defendant's side of the case at bar as illustrated in the decision of the Comptroller of the Treasury and in that of the Court of Claims on the theory that because the rank of Commodore was abolished by the "Personnel act." therefore a pay grade for all Rear Admirals, whether on the active or retired list with the pay of a Brigadier General of the Army, was established. Yet this Court, in the Rathbone case, upheld the clear intent and meaning of the statute as expressed in its language; and we respectfully submit that such must be the case here, with the result necessarily in favor of the appellant. It may have been the intent of Congress, in establishing the special pay for the nine lower numbers of the grade of Rear Admiral, to thus compensate those officers who had become entitled to the rank of Rear Admiral by reason of the abolition of the rank of Commodore, with a pay less than that to be received by those who had gained nothing by the abolition of the Commodores, and had become Rear Admirals by reason of length of service, etc., at the time the "Personnel act" became a law.

Such possible intention was outlined by this Court in the case of Rodgers *vs.* United States (*185 U. S. 83–91*). Indeed, the Court of Claims, in its opinion, after quoting from its own opinion in the Rodgers case "That for the purpose of pay, a *distinction* is created by the act in the grade of Rear Admiral and special provision therefor" (Rec., p. 11), then proceeds to quote the following from the decision of this Court in the same case:

"The individuals thus raised in rank were not so raised on account of distinguished services or for any personal reason, but simply in consequence of the abolition of the official rank they had held. Is it unreasonable to believe that Congress thought it unwise to give to those officers (who had neither by length of service or by personal distinction become entitled to the position of rear-admiral, as it had stood in the past) all the benefits of such position?

Would it be unnatural for Congress to bear in mind those who, by length of service or by personal distinction, had already earned the position, and provide that in, at least, the matter of pay there should be some recognition of the fact? Again, is it unreasonable to believe that Congress intended that those officers whose past services placed them according to the prior relative rank side by side with brigadier generals of the Army should not, by a mere chance of statute, be given a benefit in salary which was not at the same time accorded to brigadier generals in the Army? May not this explain its action in so dividing the rear-admirals into two classes—one composed substantially of former rear-admirals, equal both in rank and pay with major generals in the Army, and of the other of those who in the past were only commodores, to whom was given the rank of rear-admirals but the pay of brigidier generals in the army?"

But is not this language distinctly in favor of the appellant?

Section 11 is applicable only to those officers *with a creditable record*, who served during the Civil War.

Have they not seen length of service? Have they not rendered themselves distinguished by the fact of their having served during the Civil War, and then remained for so many years in the Navy retiring with a creditable record? Does not the very explanation suggested by this Court in the language just quoted for the action of Congress in dividing the Rear Admirals into two classes, apply with equal force, in favor of the appellant, to the action of Congress in singling out the veterans of the Civil War, putting them in a class by themselves, and referring to them in a special section of the act, and, as we submit, giving *them* three-fourths of the sea pay of the next higher *grade*, as well as the rank? Is it not because these officers are veterans of the Civil War, and so distinguished for long service and merit that Congress intended they should have three-fourths the pay of a Major General and therefore omitted to retain the rank of Commodore on the retired list for the purposes of pay at least as it did in

sections 8 and 9, where no such peculiar services and distinction are referred to?

Turning to sections 8 and 9 of the Personnel act we find that in section 8, referring to voluntary retirement, the applicant, when placed on the retired list by the President, is to receive the rank and three-fourths the sea pay of the next higher grade "as now existing, including the grade of Commodore," and in section 9, which provides for the involuntary retirement by a certain board to be convened by the Secretary of the Navy for the purpose of selecting officers to retire, in naming the compensation of the officers retired under this section, it is enacted that "he shall be retired with the rank and three-fourths the sea pay of the next higher grade, *including the grade of Commodore, which is retained on the retired list for this purpose;*" thereby especially providing for those retiring with the rank of Captain on the active list.

If, then, the contention of the Comptroller of the Treasury is correct, why should sections 8 and 9 of the "Personnel act" contain the words "including the grade of Commodore"? And, again, if Congress had, as the defendant contends, intended that the grade of Admiral should be divided into two *so-called pay grades*, why should Congress not have expressed itself practically to that effect as clearly in section 11 as in section 9 by inserting the words "including the grade of Commodore, which is hereby retained on the retired list for that purpose"? Or if the *rank* only of Rear Admiral was to be given to those retiring under section 11, why could not the words "including the grade of Commodore, which is hereby retained on the retired list for the purpose of pay only," be used, or some other words of similar import? Having omitted such or similar language from section 11, after inserting them in sections 8 and 9, it is plain that Congress intended that officers retiring by virtue of section 11 should receive three-fourths of the sea pay of the *grade* of Rear Admiral; and this plain intention is sought to be frustrated by the attempt of the defendant substantially

to read into section 11 the words contained in section 9 above quoted by applying to officers retiring under section 11 the proviso in section 7 with reference to the nine lower numbers of the grade of Rear Admiral. That the defendant cannot do this, it seems to us, has been clearly shown by the foregoing authorities.

In this connection it will be observed that while the court below refers to the above contention made in respect of these sections 8 and 9, it omits to make any substantial reply thereto.

For the above reasons, it is respectfully submitted that the judgment of the Court of Claims should be reversed.

A. A. HOEHLING, JR.,
CHARLES L. FRAILEY,
Attorneys for Appellant.

In the Supreme Court of the United States.

JOHN LOWE, APPELLANT,
v.
THE UNITED STATES. } No. 212.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The question in this case is identical with the main question in the case of Gibson, No. 195 upon the docket for this term, in which we have filed a brief on the part of the United States discussing it at length, to which we respectfully invite the attention of the court in considering the present case.

THE QUESTION.

The question in this case arises upon the following facts:

The claimant, then a captain in the United States Navy with a creditable record, who had served during the civil war, was retired by order of the Secretary of the Navy pursuant to section 1444, Revised Statutes, on December 11, 1900, "with the rank and three-fourths of the sea pay of the next higher grade, i. e., rear-admiral, in

accordance with the provisions of section 11 of the naval personnel act, approved March 3, 1899," as recited in the order of his retirement. Since his said retirement, the claimant has received pay at the rate of $4,125 a year, being three-fourths of $5,500, the pay fixed by section 1261 of the Revised Statutes of the United States as that of a brigadier-general in the Army. The question raised is upon the contention of the claimant that his pay since his retirement should have been at the rate of three-fourths of $7,500 a year (the pay of a major-general in the Army), or $5,625 a year, making a difference of $1,500 a year over and above the pay which he has received since his retirement. This question is so thoroughly considered and so completely disposed of in the opinion of Mr. Justice Weldon, delivered in this case in the Court of Claims, that there really remains nothing to be done upon this argument other than to epitomize that opinion.

A QUESTION OF PAY ONLY.

Justice Weldon has very accurately defined this to be a question of pay only, for it is beyond dispute that the claimant's rank since his retirement is that of a rear-admiral. And, in this behalf, the contention of the claimant is, in substance, that as he was retired with the rank and three-fourths of the sea pay of the next higher grade, i. e., rear-admiral, he is entitled to three-fourths of the pay of a major-general, by virtue of section 13 of the

naval personnel act, by which it is provided, "That commissioned officers of the line of the Navy * * * shall receive the same pay * * * as is or may be provided by or in pursuance of law for officers of corresponding rank in the Army;" while, by section 1466 of the Revised Statutes of the United States, a rear-admiral ranks with a major-general of the Army. These statutes, he contends, define and establish his rights.

As thus stated, there certainly seems to be no room for controversy in the case; but the statement is inaccurate, in that it is incomplete through the omission of a very important proviso or modification of section 13, found in section 7 of the same act, which, when read with it, completely alters the aspect of the case. That proviso is as follows: "That the rear-admirals embraced in the nine lower numbers of that grade shall receive the same pay and allowances as are now allowed a brigadier-general in the Army." In the case of *Rodgers* v. *United States* (36 C. Cls. R., 266), it was decided that section 7 is to be read as a part of section 13, making special provision for the pay of the rear-admirals embraced in the nine lower numbers of that grade. That decision was affirmed by this court in 185 U. S., 83, and in delivering the opinion of the court, Mr. Justice Brewer said that the effect of section 7 was to add to the general provisions of section 13 a clause like this: "Except in respect to the nine lower numbers of the grade of rear-admiral" (p. 90). It follows that

section 13, so far as it relates to the claim now under consideration, should be read as follows, avoiding all indirection:

> A rear-admiral in the Navy shall receive as sea pay seven thousand five hundred dollars a year, except that each rear-admiral embraced in the nine lower numbers of that grade shall receive as sea pay five thousand five hundred dollars a year.

As thus read, it is clear that section 13, in its completed form, provides not one amount of sea pay for the rank of rear-admiral, but two amounts, $7,500 and $5,500; and it seems equally clear that the smaller sum is as much the sea pay of a rear-admiral as the larger amount. Thus the question is narrowed down to this: Which amount of sea pay attached to the rank or grade of rear-admiral should govern the pay of the claimant after his retirement? The Court of Claims answered this question by deciding that it should be the lower amount, $5,500. That decision certainly seems to as fully meet the literal requirements of the statute as though the decision had been that the larger amount of $7,500 should govern, because, as already said, either amount is the sea pay of a rear-admiral, the next higher grade to that from which the claimant was retired. The decision also seems to be a reasonable one. It seems evident that the purpose of section 11 is to give to the naval officers therein specified, upon retirement, not only the next higher rank, but the next higher pay, and

this is a purpose which is strictly carried out upon the retirement of an ensign, a master, a lieutenant, a lieutenant-commander, or a commander. Equality would certainly seem to demand that no exception should be made to this rule in the case of the retirement of a captain, and yet this is exactly what the claimant is contending for. But it is urged that $5,500, which is the salary of a brigadier-general, is not really the sea pay of the grade of rear-admiral, but is simply the sea pay of each of an excepted class of rear-admirals, to wit, those embraced within the nine lower numbers on the active list. There is a subtlety about this that is difficult to grasp. Section 7 of the naval personnel act at the outset provides "that the active list of the line of the Navy * * * shall be composed of eighteen rear-admirals." Then comes the proviso for the pay of each rear-admiral embraced in the nine lower numbers of that grade. It follows from this, as a mathematical conclusion, that since out of the eighteen rear-admirals on the active list thus provided for nine are of the *nine lower* numbers, nine are also necessarily of the *nine upper* numbers.

The sea pay of each rear-admiral embraced in the nine lower numbers of that grade is fixed, in effect, by this proviso to section 7, at $5,500, and the sea pay of each rear-admiral embraced in the nine upper numbers of that grade is fixed by section 13, in effect, at $7,500. If, as argued by

counsel for claimant, there is thus constituted a special class of rear-admirals receiving $5,500 each, there is equally constituted another special class receiving $7,500 each. This lower amount of sea pay of $5,500 is, we repeat, the next higher pay of the grade into which the claimant was retired. It is $2,000 more than the pay of a captain in the Navy, the rank held by the claimant at the time of his retirement, whilst, as thus determined, his present retired pay is $625 more than his full sea pay as captain. By the claimant's contention his retired pay would be three-fourths of $7,500, being $5,625 a year, or $2,125 more than his full sea pay as captain.

As for the argument on behalf of the appellant that "if the contention of the defendant is to prevail, instead of there being nine to receive the pay of a brigadier-general, as contemplated by the proviso [of section 7], there would be many more than nine receiving the pay or three-fourths thereof," sufficient answer seems to be that neither the number nor the pay of officers on the retired list can have any effect upon the operation of any of the provisions of section 7 relating to rear-admirals on the active list. This is necessarily so, since otherwise the retirement of a captain with the rank of rear-admiral must be construed in violation of that part of section 7 which provides that the active list of the line of the Navy shall be composed of eighteen rear-admirals. Furthermore, as a matter of fact, there are to-day,

according to the Register of the Commissioned Officers of the Navy of the United States to January 1, 1904, twenty-seven rear-admirals on the active list, nine of whom are *additional in grade* and eighteen of whom receive the pay of a rear-admiral embraced in the nine lower numbers of the active list—i. e., the pay of a brigadier-general. These rear-admirals *additional in grade* were promoted to that rank "for eminent and conspicuous conduct in battle or extraordinary heroism," pursuant to section 1506 of the Revised Statutes.

THE RODGERS CASE.

The decision of the Court of Claims in this case is largely rested upon the authority of the Rodgers case, above referred to, and it seems to us that that case is practically decisive of the present claim. In the Rodgers case, as in this case, the claimant, who was, at the time, a commodore in the Navy, passed, through the operation of the naval personnel act, into the grade and took the rank of rear-admiral. Immediately upon finding himself invested with this higher rank he, like the claimant, raised the question of his pay, and, like the claimant, alleged that since the rank of rear-admiral corresponded with that of major-general in the Army, his pay was, by virtue of section 13, the same as that of a major-general, or $7,500 a year. But it was held by the Court of Claims, and by this court, that his pay was governed by the proviso in section 7 of the same act and was, therefore, $5,500

per year. Here was a clear question of the pay of an officer newly passed into the grade and holding the rank of rear-admiral. It seems to be exactly the question in this case, except that Rodgers stepped into the active list and the present claimant stepped into the retired list of rear-admirals. There seems to be absolutely no reason why the pay of one rear-admiral who has reached that rank by promotion should be less than that of another who has reached the same rank by retirement. To make what seems to us the unfairness of the claimant's contention more emphatic, let us take the case of a captain in the Navy who, like the claimant, had served during the civil war with a creditable record, and who, on the same day that the claimant was retired as a rear-admiral, should be promoted to the same rank. By claimant's contention, the captain thus promoted would receive $5,500 as his full sea pay, whilst the claimant would receive, as his retired pay, three-fourths of $7,500, or $5,626, $125 per year more than the full sea pay of his brother officer who became a rear-admiral on the same day as himself. But here counsel for claimant refer to the discussion by Mr. Justice Brewer in the Rodgers case of the origin and purpose of the naval personnel act, as applied to its reconstruction of the grade of rear-admiral, wherein it was pointed out that the claimant in that case, with the others embraced in the nine lower numbers of that grade, had become a rear-admiral because of the abolition by the

naval personnel act of the rank of commodore, which he had formerly held, and not on account of distinguished services or any personal reason, and that therefore it seemed reasonable that Congress should have intended to make a distinction in the matter of pay between officers thus promoted and those of the same grade who at the time of the passage of the act were and had been holding the rank of rear-admiral. And the spirit of these remarks, it is contended, applies in favor of the claimant in the present case, because he is, by section 11 of the naval personnel act, marked out for special consideration upon retirement by reason of the fact of his services in the civil war, whereas by sections 8 and 9 of the same act, relating to the retirement of naval officers, it is provided that on retirement thereunder a captain shall be retired with the rank and three-fourths of the sea pay of a commodore, which rank is retained on the retired list for this purpose. It is true that a distinction is thus made in favor of the claimant, but it is also true that under the operation of section 11 this distinction has been preserved so far as rank is concerned, since the claimant has been retired under that section with the rank of rear-admiral, whilst a captain retired under section 8 or 9 would have been retired with the rank of commodore. And in this connection attention is again called to the fact already referred to in this brief that there are at present on the active list nine rear-admirals

additional in grade, who have been promoted to that rank not merely by reason of service in the civil war, but because of eminent and conspicuous conduct in battle or extraordinary heroism, and yet none of these officers thus promoted to the rank of rear-admiral receives the higher pay of that grade. Amongst this number are Admiral Evans, advanced by numbers for gallant conduct at the capture of Fort Fisher, January, 1865; Admiral Terry, advanced five numbers for gallant conduct in 1864 on an expedition up Red River; Admiral Sigsbee, advanced for extraordinary heroism during the war with Spain.

But the considerations which Mr. Justice Brewer found so pertinent and persuasive in the Rodgers case have no proper place here, for the reason that the weight and office of those considerations have been already employed in the Rodgers case in determining the precise question of pay raised in this case. So that it having been then decided that $5,500 per year is the lower sea pay of the grade of rear-admiral, it is manifestly idle to here review the considerations by which that conclusion was reached—a conclusion practically determinative of the present claim. For the sole question in this case is, What is the sea pay of a rear-admiral? The answer to this question must of necessity be found in the statutes relating to that subject. If, as contended by claimant, section 13, unmodified by section 7, is controlling,

then that pay is $7,500, but if, as decided in the Rodgers case, there are two grades of pay attached to that rank, and the lower grade of pay is $5,500, it would seem that this lower grade of pay should determine the pay of the claimant.

It seems to us that the decision of the Court of Claims in this case not only justly and fairly interprets the statutes relating to this claim, but that it is governed by and clearly follows the decision of this court in the Rodgers case, and therefore should be affirmed.

LOUIS A. PRADT,
Assistant Attorney-General.

JOHN Q. THOMPSON,
Special Attorney.

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See end of this opinion. 19743

Supreme Court of the United States.

No. 195.—October Term, 1903.

William C. Gibson, Appellant,
vs.
The United States.
} Appeal from the Court of Claims.

[April 25, 1904.]

This is an appeal from the Court of Claims. The claimant is a retired rear admiral. This action was prosecuted to recover the difference between three-fourths the pay of a brigadier general and that of a major general of the Army, accorded by statute to retired rear admirals. The Court of Claims dismissed the petition, holding the claimant entitled to three-fourths the pay of a brigadier general. Upon the hearing in that court the following facts were found:

"I. The claimant, William C. Gibson, was duly appointed a captain in the Navy, to rank from February 18, 1900. While serving in that grade, then being an officer of the Navy, with a creditable record, who served during the civil war, he was retired by the following order:

'Navy Department,
Washington, June 30, 1900.

'Sir: On June 23, 1900, you will regard yourself transferred to the retired list of officers of the U. S. Navy, in accordance with the provisions of section 1444 of the Revised Statutes, and with the rank and three-fourths of the sea pay of the next higher grade, *i. e.*, rear admiral, in accordance with the provisions of section 11 of the Naval Personnel Act, approved March 3, 1899.

Respectfully, John D. Long,
Secretary.

'Captain William C. Gibson, U. S. Navy, commanding U. S. S. Texas.'

"II. Since his retirement he has received pay at the rate of four thousand one hundred and twenty-five dollars ($4,125) a year, being three-fourths of five thousand five hundred dollars, ($5,500,) the pay fixed by section 1261 of the Revised Statutes of the United States as that of a brigadier general in the Army.

"If paid at the rate fixed by said section 1261 for a major general in the Army, he would receive pay at the rate of three-fourths of seven thousand five hundred dollars a year, being five thousand six hundred and twenty-five dollars ($5,625) a year, a difference of over and above what he has been receiving of one thousand five hundred dollars ($1,500) a year.

"III. From January 22, 1900, to July 3, 1900, inclusive, claimant was, by regular assignment, in command of the U. S. S. Texas, a seagoing

vessel in commission. During that period he was, prior to the 18th of February, a commander in receipt of pay at the rate of four thousand dollars ($4,000) a year, and from and after that date a captain, receiving pay at the rate of four thousand five hundred dollars ($4,500) a year. He did not, while so attached to and in command of said vessel, receive any sea ration or commutation therefor, under Revised Statutes, sections 1578 and 1585 (reply of Navy Department not printed).

"The commutation therefor at the rate of thirty cents per day would amount to forty-eight dollars and ninety cents ($48.90)."

Mr. Justice DAY delivered the opinion of the Court.

The first question presented is whether a captain in the Navy retired as a rear admiral, under section 1444 of the Revised Statutes of the United States and section 11 of the Navy Personnel Act, shall receive three-fourths of the pay of the rear admirals in the nine higher numbers in the list of rear admirals or the like proportion of the pay of the nine lower numbers of the eighteen rear admirals.

Section 1444 of the Revised Statutes provides: "When any officer below the rank of vice admiral is sixty-two years old he shall, except in cases provided in the next section, be retired by the President from active service."

Section 11 of the Navy Personnel Act reads: "That any officer of the Navy with a creditable record, who served during the civil war, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade." (30 Stat. 1007.)

Section 13 provides: "That after June thirtieth, eighteen hundred and ninety-nine, commission officers of the line of the Navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

In the first proviso of section 7 of said act, provision having been made for eighteen rear admirals in the active list of the line of the Navy, it is enacted as follows: "*Provided*, That each rear admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowances as are now allowed a brigadier general in the Army." (30 Stat. 1005.)

The claimant at the time of his retirement was a captain in the United States Navy, who had served during the civil war, and was retired, by order of the Secretary of the Navy, pursuant to section 1444 of the Revised Statutes, with the rank and with three-quarters of the sea pay of the next higher grade, in accordance with section 11 of the Navy Personnel Act above quoted.

By section 1446 of the Revised Statutes of the United States it is provided:

"The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army shall be as follows, lineal rank only being considered:

"The vice admiral shall rank with the lieutenant general.
"Rear admirals with major generals.
"Commodores with brigadier generals.
"Captains with colonels.
"Commanders with lieutenant colonels.
"Lieutenant commanders with majors.
"Lieutenants with captains.
"Masters with first lieutenants.
"Ensigns with second lieutenants."

Section 1261 fixes the pay of the officers of the Army:

"The officers of the Army shall be entitled to the pay herein stated after their respective designations:

"The general: thirteen thousand five hundred dollars a year.
"Lieutenant general: eleven thousand dollars a year.
"Major general: seven thousand five hundred dollars a year.
"Brigadier general: five thousand five hundred dollars a year.
"Colonel: three thousand five hundred dollars a year."

The claim of the appellant is, in substance, that the pay of the next higher grade above captain, the three-quarters of which the appellant is to receive, is the full pay of a rear admiral, that of a major general, and not what is claimed to be the exceptional pay for the nine lower numbers of that grade who are to receive the pay and allowance of a brigadier general.

It is admitted in the discussion, that the provision fixing the pay of the nine rear admirals to correspond with the pay of a brigadier general arose from the fact that the relative rank of officers of the Army and Navy had been so adjusted by statute as to rank commodores with brigadier generals, and the rank of commodore being dropped from the service, the pay of a brigadier general was given to the nine lower numbers of the rear admirals, who would otherwise have had the rank of commodores with the corresponding pay of brigadier generals.

The argument for the appellant insists that the language is plain and so explicit as to need no construction; but the fact that the rear admirals are divided into two classes for the purposes of pay, and the statute not specifically pointing out which class of pay shall be given those situated as the claimant is, leads us to consider the objects to be attained by the new law, the circumstances under which it was enacted, and to construe the language used in view of the purpose of Congress in enacting the statute.

There is no question that, had the claimant been promoted in the active service from captain to rear admiral, he would have passed into the lower grade of rear admirals, so far at least as his pay was concerned, and would have received, so long as within that number, the pay of a brigadier gen-

eral, notwithstanding that for all other purposes he was entitled to the rank and privileges of a rear admiral.

The appellant was promoted, and almost immediately retired; when thus retired, having served during the civil war, he was given the rank of the next higher grade and three-fourths of the sea pay of that grade. Congress had already created for the purposes of pay a division in the rank or grade of rear admiral, with higher pay for those of higher number and lower pay for others in the rank. It seems to us that it was the object of Congress, when retiring an officer under the circumstances stated, that he should receive the pay of the next higher rank, and, but for the division made in the pay of rear admirals, he would receive the three-quarters of the full pay of that rank, but taking one step upward for the purpose of pay he passes into and not over the next pay grade, which is that of the nine lower numbers.

In regular gradation in the active service, a rear admiral, for the purposes of pay, must first serve through the nine lower numbers of the grade. So with a retiring officer; it is the purpose to give him, as compensation in the regular order of promotion, the pay of the "next higher grade." This conclusion is in harmony with the decision of this court in *Rogers* v. *United States*, in which Mr. Justice Brewer, speaking for the court, said of this statute:

"The individuals thus raised in rank were not so raised on account of distinguished services or for any personal reason, but simply in consequence of the abolition of the official rank they had held. Is it unreasonable to believe that Congress thought it unwise to give to those officers (who had neither by length of service or by personal distinction become entitled to the position of rear admiral, as it had stood in the past) all the benefits of such position? Would it be unnatural for Congress to bear in mind those who by length of service or by personal distinction had already earned the position, and provide that in, at least, the matter of pay there should be some recognition of the fact? Again, is it unreasonable to believe that Congress intended that those officers whose past services placed them according to the prior relative rank side by side with brigadier generals of the Army, should not, by a mere change of statute, be given a benefit in salary which was not at the same time accorded to brigadier generals in the Army? May not this explain its action in so dividing the rear admirals into two classes—one composed substantially of former rear admirals, equal both in rank and pay with major generals in the Army, and the other of those who in the past were only commodores, to whom was given the rank of rear admirals but the pay of brigadier generals in the Army?"

We cannot believe that it was the intention of Congress that an officer upon retirement, and whose promotion shortly before his retirement was made for the purpose of giving him an increase of pay as well as rank, was intended to be given the higher grade of pay reserved for those of distinction or long service in the grade to which the retiring officer was pro-

moted, leaving those in the active service who earned the right to promotion to receive the lower grade of pay. In short, we believe it was the intention of Congress to promote a retiring officer for the purposes of pay into the next grade above that in which he served before retirement. In this case such compensation was that provided for rear admirals of the lower grade. If this were not so, a retiring rear admiral would receive, under the circumstances now before us, more pay upon retirement than is given to the rear admirals in active service, in the lower pay grade. It is urged that the promotion and retirement of those who had rendered valuable service in the civil war was the object of Congress, which purpose is best subserved by construing the statute to give in case of such promotions the full rank and pay of the grade to which the officer is promoted. This reasoning may be adequate to furnish a motive for such legislation, but we can only give effect to purposes expressed or necessarily implied in the terms of the statute.

But, it is urged, that in sections 8 and 9 of the Navy Personnel Act, Congress, in providing for retirement of naval officers, has included the grade of commodores, and provides that captains within their terms shall be retired with three-fourths the pay of the next higher grade, "including the grade of commodore, which is retained on the retired list for this purpose," thus evincing the purpose of Congress to retain the rank and pay of commodores in express terms when such is the purpose. But this reservation is for officers retired under these sections who are not to rank above commodores, while officers who served in the civil war and are retired are to have the full rank of admirals with the pay of the lower grade of the rank.

We agree with the Comptroller of the Treasury and the Court of Claims in the construction to be given this statute. If the purpose of Congress has been mistaken the law can be corrected by a new enactment making clear the intention to give the more liberal treatment contended for by the appellant.

The question remains as to the right of this officer to receive commutation for the sea ration provided for by sections 1578 and 1585 of the Revised Statutes. These sections are:

"SEC. 1578. All officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a sea-going vessel.

"SEC. 1585. Thirty cents shall in all cases be deemed the commutation price of the navy ration."

The provision of section 13 of the Navy Personnel Act is:

"Officers of the Navy shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army." (30 Stat. 1007.)

The claim upon this branch of the case is that sections 1578 and 1585 are not repealed in express terms by section 13 of the Navy Personnel Act, and, as repeals by implication are not favored, it is argued that, notwithstanding the later law, the allowance for sea rations still remains for naval officers. But the later act distinctly provides that after June 30, 1899, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same compensation and allowance, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army. This section was intended to cover and in exact terms provides for all pay and allowance for naval officers except forage. Where it is the intention of the statute to make a distinction or exception in allowance, that exception is expressly stated. The subject matter of the later act provides for allowances to such officers, and it is to be the same as is now provided by law for Army officers of corresponding rank. Had Congress intended that such allowances as theretofore given should be continued, or to reserve the right to commutation as to the sea ration, it would have been very easy to have inserted apt words which would have rendered effectual this purpose. But the terms of the law undertaking to revise former laws upon the subject make no such reservation as is contended for, and we think we are not at liberty to add to the statute by inserting it.

It is true that repeals by implication are not favored, but where the same subject matter is covered by two acts which cannot be harmonized with a view to giving effect to the provisions of each, to the extent of the repugnancy between them the latter act will prevail, particularly in cases where it is apparent that the later act was intended as a substitute for the earlier one. (*District of Columbia* v. *Hutton*, 143 U. S. 18–26.)

It is admitted that a change in the compensation of naval officers was made by the enactment of the new law, and, while section 13 provided that such officers should not be reduced in pay, there is no provision retaining the allowances of the former act. Moreover, section 26 of the Navy Personnel Act provides that all acts and parts of acts, so far as they conflict with its provisions, shall be repealed. For the reasons stated we think the allowance of the previous statute cannot stand consistently with the express provision upon the same subject of the later act.

We find no error in the judgment of the Court of Claims, and the same is

Affirmed.

Mr. Justice BREWER took no part in the consideration or decision of this case.

19746

Supreme Court of the United States.

No. 212.—October Term, 1903.

John Lowe, Appellant,
vs.
The United States.
} Appeal from the Court of Claims.

[April 25, 1904.]

Mr. Justice Day delivered the opinion of the Court.

This case involves the same question, upon identical facts, as to the pay of a retired rear admiral, just disposed of in the case of *Gibson* v. *United States, ante,*

For the reasons therein stated, the judgment of the Court of Claims, dismissing the petition of the appellant, is

Affirmed.

Mr. Justice Brewer took no part in the consideration or decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.